

# **Where Does the Buck Stop and the Litigation Begin?**

*A Dose of Truth  
About IAQ in Schools*

Mark C. Metzger  
*Hinshaw & Culbertson*

District 220 was warned about mold, officials say

# Mold tests delay school opening

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*District 220 parents demand answers as mold testing at school continues*

Mold nightmare hits family

*How ice dam problem forced family out of home,*

CONFOUNDING FUNGUS

Families blame mold for making them sick, forcing them from their homes

WHY

Common sources of moisture that lead to mold



**It's a problem of  
Indoor Air Quality**

# ***Environmental Factors***

In general, the quality of the indoor environment is a combination of two main factors:

1. The concentration of contaminants in the air
2. Physical stressors in the environment

- Temperature
- Humidity
- Noise
- Light

# ***What Causes IAQ Problems?***

Three things coming together:

- A pollutant source
- Inadequate ventilation
- Susceptible people

# ***Buildings are Systems***

- Envelope
- Foundation
- Mechanical Systems
- Site



# ***Framework of Analysis***

- Design
- Construction
- Operations & Maintenance

# ***Problems Occur***

- Source
- System
- Symptoms



# ***How Schools are Unique - and Uniquely Vulnerable***

- Occupancy rates
- Budget constraints
- Pollutant sources
- Large number of HVAC systems
- Added space and systems
- Space usage changes
- Emphasis on energy conservation
- The school's energy management system often takes control of the HVAC System away from teachers
- Susceptibility of students

# ***Contaminants***

- Chemicals (VOC's)
- Particulates
- MOLD

## Mold *n.*

1. A fungus growth, sometimes toxic that thrives on decaying matter in moist, warm places, such as the building materials of homes, schools, and offices.
2. A serious financial, health and liability risk that should be addressed quickly and expertly.

# ***How Big is the Problem?***

- 300% increase in mold-related lawsuits nationwide since 1999
- 10,000 mold cases now pending nationwide

# ***Claims***

## ■ Texas

- 2000 – 20,000 Mold Insurance Claims
- 2002 – 37,000 Mold Insurance Claims (\$850,000,000)

## ■ California

- 1999 \$206,000,000 paid in Mold Claims
- 2001 - \$406,000,000 paid in Mold Claims

## ■ Florida

- 2001 Mold Insurance Claims increase 743% since 2000

# ***So. . . Why Now?***

- Doctors' willingness to attribute illness to "the building"
- Litigation
- Media Attention
- No regulations or standards

# ***Recent Cases***

- Texas - \$32 million verdict
- Delaware - \$1 million verdict
- California - proposed class action
- Florida – First Class certified

# ***Types of Claims Which Can Affect Your Schools***

- Workers' Compensation - teachers/staff
- Personal Injury - students
- American with Disabilities Act (ADA)



# ***Legal Issues***

## IMMUNITY

Varies by state,  
but generally  
won't apply

# ***Joint and Several Liability***

- Design
- Construction
- Operations and Maintenance

# **Construction Statute of Repose**

Lawsuit must be filed within a certain number of years. Often 10.

# ***DAMAGES***

## ■ Personal Injury

- Present
- Future
  - Medical Monitoring

## ■ Attorneys' Fees

- Contract
- Fraudulent Concealment
- Insurance Code

## ■ Property Damage

- Structural
- Personal Property
- Remediation Costs
- Consequential Damages
- Fraudulent Concealment
- Punitive Damages

# ***Insurance Issues***

- Occurrence
- Pollution Exclusion
- Exclusions for defective:
  - design
  - construction/renovation
  - maintenance
- Other Specific Exclusions
  - fungus
  - decay
  - deterioration
  - hidden or latent defects

# ***The State of the Law & The Standard of Care***

- No standards for permissible exposure limits
- No standards for dose/response
- Guidelines for water damage and remediation
- No requirements to be:
  - a mold remediation contractor
  - an environmental/mold investigator

# ***What Standards Exist?***

	Building Envelope	HVAC Systems	Plumbing Systems
Moisture Control	Yes	Yes	Yes
Moisture Remediation	Yes	Emerging	No
Mold Abatement	Emerging	Emerging	No

# ***Standards / Guidelines***

## Design Standards

Yes, but insufficient  
and often conflicting  
and uncoordinated.

## Construction Standards

Yes, but insufficient  
and often conflicting  
and uncoordinated

## Operating Standards

Weak to  
non-existent



# ***Standards / Guidelines***

- **New York City Guidelines:**

Assessment and Remediation of Fungi in  
Indoor Environments

- **EPA:**

Mold Remediation in Schools and Commercial  
Buildings

# ***The Legal Risks Due to The Lack of Standards***

# ***The Standard of Care***

What a reasonable person/business would do  
under the same or similar circumstances

**A FACT QUESTION: THE JURY DECIDES**

# ***How IAQ Complaints Turn into IAQ Litigation***

and what you can do to prevent that

# ***EPA Offers an Answer: Tools for Schools***

- [www.epa.gov/iaq/schools](http://www.epa.gov/iaq/schools)

- Strengths:

- Teaches the need for a plan
- Good place to start

- Weaknesses

- Overly simplifies issues and solutions
- Far too paper intensive

# ***How to Keep IAQ Complaints from Becoming IAQ Problems***

- Quick response
- Appropriate investigation
- Have a strategy
- Communication

# ***From Complaints to Lawsuits***

- Ignore or minimize complaints
- Delay
- Problems get worse
- People polarize

# ***The Problem Bifurcates***

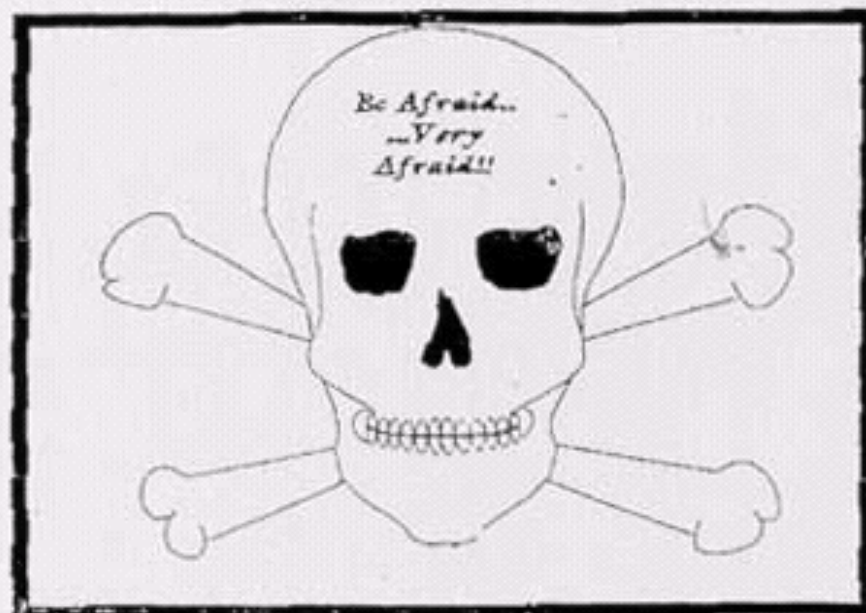
1. IAQ Problem

2. PR Problem



# "SAVE OUR STUDENTS"

## A Sick School



Lead⊗Unsafe Drinking Water⊗Bad Air⊗Oozing Tiles⊗Wet  
Carpet⊗Wet Ceiling Tiles⊗Dangerously High Carbon Dioxide  
Readings⊗Emergency Tracheotomy⊗Bacterial Meningitis⊗Child  
Hospitalized-Respiratory Arrest⊗Pneumonia⊗  
Bronchitis⊗Asthma⊗Mold⊗Ear, Eye, Nose and Throat  
Problems⊗Eczema⊗Strep⊗Open Sores  
⊗Skin Disorders⊗Extreme Fatigue⊗Headaches

# ***IAQ-Mold Team***

- Technical Support
- Management Team
- Legal Support
- Public Relations
- Insurance

# ***Proactive Plan***

- A plan for Recognizing and Managing IAQ Risks
- Assessment of Contract Documents
- Internal Policies and Procedures to Limit Potential Liability
- Training
- A Crisis Management Plan and Team
- Communication Plan
- Assessment of Existing Insurance Coverage

# ***Communication***

Share information about Causes  
and Solutions

- Effectively
- In a form designed to minimize  
your legal exposure

# ***IAQ/Mold Management Plan Components***

- Internal personnel for prevention
- Training of personnel for prevention, recognition and response
- Protocols for Vendors
- Employment Issues
- Documentation
  - Preventative measures
  - Policies and procedures
  - Complaints
  - Responses
  - Remediation

# ***Technical Support***

- Identification of sources of potential IAQ / Mold problems
- Solutions for potential IAQ / Mold problems
  - Remediation of mold
  - structural/mechanical
- Crisis Management Plan
  - Assessment
  - Testing / Analysis
  - Remediation

# ***Legal Support***

- Privilege Issues
- Documentation
- Evidence
  - Creation
  - Spoliation
- Communication
- Coordination of Work
- Retention of Experts

# ***Public Relations and Communication***

- Education
- Centralized voice
- Communication
- Media Policy and Contacts
- Notices



# ***Insurance***

- Assess existing coverage
- Determine additional needs
- Need for a proactive plan for coverage

# ***“A Good Offense is the Best Defense”***

- Loss Prevention
- Early, Effective Response
- Minimize risk
  - of lawsuits
  - the magnitude of a lawsuit
- Maximize your defenses

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# ***The Best Insurance***

Minimize your Risk  
By  
Proactive Planning